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NO. 92-198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

THE STATE OF TEXAS,
Petitioner

VS.

MICHAEL LEE HILL,
Respondent

BRIEF IN OPPOSITION TO THE STATE'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES MICHAEL LEE HILL, Respondent herein, by and through his attorney, Lawrence G. Boyd, and files this his brief in Opposition, subject only to his Motion to Proceed in forma pauperis.

OBJECTIONS TO JURISDICTION

I.

THE STATE'S PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY, SINCE IT WAS FILED IN EXCESS OF NINETY DAYS AFTER THE DENIAL OF ITS MOTION FOR REHEARING

The opinion of the Court of Criminal Appeals was entered on January 8, 1992. On January 29, 1992, the State filed its motion for rehearing, which was "denied" without further opinion on April

15, 1992. The State attempted to file a second motion for rehearing on May 4, 1992, which was "dismissed" that same day. This Court will note the difference between the rulings of the Court of Criminal Appeals on the two motions. Note carefully that the State's first Motion for Rehearing was "denied" without any further opinion [emph.]. Motions for Rehearing in the Court of Criminal Appeals are governed by the following relevant portions of the Texas Rules of Appellate Procedure:

> (a) A motion for rehearing may be filed with the Clerk of the Court of Criminal Appeals within 15 days after the initial opinion or order is delivered, unless the time is shortened or enlarged by the court. However, no motion for rehearing will be received from an order granting discretionary review.

T.R.A.P. Rule 230(a) (Vernon 1990). Thus, the rules provide for an initial Motion for Rehearing within fifteen (15) days following the delivery of the court's initial opinion. The State has conceded that this initial motion was denied without further opinion [emph.] on April 15, 1992. The rules governing a second, or subsequent, motion for rehearing are set forth, as follows:

> (c) If five members of the Court are of the opinion that a rehearing should be granted in whole or in part, the motion will be granted and the cause will be thereafter set for submission to the court. Otherwise, the motion for rehearing will be denied.
>
> * * *
>
> (f) If the court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission, the losing party may file a motion for rehearing within 15 days after said opinion is delivered. In such event, the procedures outlined in (a) through (e) above will be followed.

T.R.A.P. Rule 230(c), (f) (Vernon 1990). The State's initial Motion for Rehearing was denied without resubmission, oral argument or further opinion [emph.] on April 15, 1992. The rule governing

second, or subsequent, motions for rehearing, provides that such motions may be filed only "if the court delivers an opinion on rehearing which changes the disposition of the cause from that on original submission." Id. No opinion on rehearing was delivered at all. The State's second Motion for Rehearing was a legal nullity. It had no support in the Texas Rules of Appellate Procedure at all. This is why it was "dismissed" and not "denied".

The State's second motion for rehearing would not have been timely filed if an opinion had been delivered in connection with its initial motion for rehearing. We have no evidence before us that the second motion for rehearing, which was filed on a date greater [emph.] than 15 days after the court's April 15th ruling on the State's initial motion, was filed in compliance with the rule governing timely filing by mail. T.R.A.P. Rule 4(b) (Vernon 1990). In any event, since no authority existed for the second motion for rehearing, the benchmark date for filing the State's Petition for Writ of Certiorari commenced on April 15, 1992, not on May 4, 1992, as the State's representative urged in its Petition for Writ of Certiorari.

The significance of the "dismissal" of the State's unauthorized second motion for rehearing on the very date that it was untimely filed was evidently lost on the State's representative. The Mandate of the Court of Criminal Appeals issued on May 1, 1992, fifteen days following its ruling on the "final" [emph.] State's Motion for Rehearing, the one which was "denied" on April 15, 1992. The State's illegitimate "Motion to Recall Mandate" is attached hereto as Respondent's first exhibit. This motion, which has no legal significance, reveals that the

State saw that its second Motion for Rehearing had been "dismissed" but did not comprehend this fact until May 26, 1992. The State's representative has obviously never comprehended the reason for the summary "dismissal" of the second motion, because it was untimely and utterly without support in the rules of appellate procedure. The State's "Motion to Recall the Mandate" was likewise a legal nullity since T.R.A.P. rule 232 provides only for a Motion to Stay the Mandate for not more than sixty (60) days which must be filed within fifteen (15) days following the denial of the State's original Motion for Rehearing. T.R.A.P. Rules 231 and 232 (Vernon 1990). No Texas authority exists for the recall of a Mandate once it is issued. The time for filing the State's Petition for Writ of Certiorari had commenced to run on April 15, 1992. It would run out on July 14th, 1992.

The rules of this Court provide that the State's Petition for Writ of Certiorari should have been filed within 90 days after the entry of the judgment of the Court of Criminal Appeals. Sup.Ct.R. 13.1 (1990). Since an original motion for rehearing was filed, the time to commence the 90-day period for filing the State's Petition for Writ of Certiorari was extended until the "denial" [emph.] of its original motion for rehearing on April 15, 1992. Sup.Ct.R. 13.4 (1990). The final date on which the State could have timely filed its Petition for Writ of Certiorari was July 14, 1992. The Clerk of this Court is required to refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time. Sup.Ct.R. 13.3 (1990). Objections to the jurisdiction of this Court shall be included in the Brief in Opposition. Sup.Ct.R. 15.4 (1990). Since the State's Petition for Writ of Certiorari did not

even purport to be filed by mail until July 29, 1992, it was not timely filed. Sup.Ct.R. 29.2 (1990).

II.

THE STATE'S PETITION FOR CERTIORARI FAILS TO SEEK RELIEF OF THE TYPE PERMITTED OR CONTEMPLATED BY 28 U.S.C. § 1257 BECAUSE NOWHERE DOES THE STATE CHALLENGE THE CONSTITUTIONALITY OF ANY TEXAS STATUTE OR TEXAS COURT'S RULING; NOR DOES THE STATE ARGUE THAT ANY TEXAS STATUTE OR TEXAS COURT'S RULING IMPERMISSIBLY CONFLICTS WITH FEDERAL LAW.

The State's petition for certiorari should be denied by this Court because the issues that the State would have this Court review fall outside the scope of the proper jurisdiction Congress has conferred upon this Court through 28 U.S.C. § 1257. 28 U.S.C. § 1257. Careful examination of each of the State's Questions Presented and Reasons for Review will readily reveal that nowhere within them does the State's representative frame any issue in a manner appropriate for consideration by this Court.

Ostensibly, the State's representative would obtain jurisdiction in this Court through 28 U.S.C. § 1257(a), which, in pertinent part, confers jurisdiction upon this Court to review state court decisions

> [W]here the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

Indeed, the state seeks to have this Court reverse the decision of the Texas Court of Criminal Appeals. But, precisely, for what reason? On what <u>type</u> <u>of</u> grounds? Nowhere in its brief does the State argue, even in passing, that either the Texas court's decision <u>or</u> the state statute analyzed therein (that is, art.

35.261) violates, or is repugnant to, the United States Constitution, the decisions of this Court, or the laws of the United States.

Not one of Petitioner's six Questions Presented and corresponding Reasons for Review fulfills the statutory requirements for this Court to review this case. In its brief, the State challenges neither the constitutionality, nor the congruence with Federal law, of art. 35.261 and the Texas court's decision. Instead, the State seeks to employ this Court as a mere court of appeals or errors. The state would have this Court decide not constitutional law issues but secondary, technical, and policy-oriented ones concerning various aspects of the application of state law.

None of the issues raised in the State's brief impinges upon or directly addresses the adequate and proper enforcement of Constitutional guarantees or Federal laws. Each of these issues--e.g., the existence of a prima facie case, the precise sequence and procedure states may implement to challenge improper peremptory challenges, the methodology appellate courts should use in reviewing trial court decisions--occupies the realm of state law and procedure. In fact, given that in Batson this Court specifically noted that the states were free to establish their own procedures in this area, the only scenario in which a petitioner could properly challenge these procedures in this Court would be one in which the state had enacted measures that failed to meet the Batson standards. The State, obviously, would lack interest in making such an argument, and, quite naturally, does not make the attempt.

No state may permit its police, courts, or laws to provide a level of protection inferior to that which the Federal Constitution guarantees. It is well established, however, that the states do enjoy the option to provide greater levels of protection if they wish. As this Court put it in Oregon v. Hass, 420 U.S. 714 (1974),

> a state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon Federal Constitutional standards...[but a state cannot] impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them. (Emphasis added.)

Hass, 420 U.S. 714, 719 (1974).

In the case at bar, the State of Texas has imposed, through article 35.261 and the subsequent judicial analysis, a form of protection in the wake of Batson that simply enhances the basic, minimum level of federally mandated equal protection of the laws that this Court deemed required by the Constitution. The Texas Court of Criminal Appeals has duly construed a Texas statute in a manner that does not derogate federal law; hence, no need exists for this Court to second-guess the Texas Court's judgment, even if the Texas procedure were costly, time-consuming, and unwieldy--a view the State's representative stands almost alone in expounding.

Were this Court to grant certiorari in this case, it would fall afoul of a fundamental principle of Constitutional adjudication--that, wherever possible, this Court should avoid finding federal questions upon which to rule. Although the State purports to raise questions concerning the interpretation of Batson, all of the issues the State raises really concern Batson itself very little; rather, they take issue with the Texas Court's interpretation of the application of its (indisputably)

constitutional statute.

Even assuming, arguendo, that the Texas Court of Criminal Appeals has interpreted art. 35.261 in a broad manner that (supposedly) will be arduous or perhaps unwieldy to implement at the trial level (a highly dubious notion), none of that should concern this Court. In a remarkably relevant passage, this Court once refused to reverse the California Supreme Court, holding instead that

> [a]t times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

Black v. Cutter Laboratories, 351 U.S. 292 (1956). (Emphasis added.)

In the case at bar, the State seeks review of state--not federal--questions of law that have arisen since the Texas legislature's passing of art. 35.261 in its Code of Criminal Procedure. Significantly, the State does not argue that this statute--or the decision of the Texas Court of Criminal Appeals--is unconstitutional; with what, then, is the State left as a basis for its arguments? It can raise only questions of application and procedure of such a sort that ruling upon them, if this Court deigns to do so, would place this Court in the undesired and unauthorized role of a "third" court of criminal appeals.

Prior decisions of this Court have made it clear that this Court does not sit as a mere "third" court of appeals. Rather, this Court's role in the judicial system is unique: to grant certiorari

at its own discretion and to review cases in which, according to the mandate of 28 U.S.C. § 1257, issues of Constitutionality or federal supremacy are at stake. In Burgett v. Texas, 389 U.S. 109 (1968), this Court noted that "we do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose...provided that none of them infringes a guarantee in the Federal Constitution." Burgett, 389 U.S. 109, 113-114 (1968). If this Court were to grant certiorari on the Questions Presented and the Reasons for Review proffered by the State in this case, this Court would be casting itself in the very role its jurisprudence has always sought to avoid.

Yet the State's representative, quite understandably, dares not make any attempt to suggest that the Texas statute is unconstitutional, and consequently has been forced to confine the scope of his Reasons for Review to non-constitutional, ordinary state appellate issues of the type inappropriate for adjudication by this Court. For any suggestion or hint that the Texas Court's ruling and art. 35.261 are actually unconstitutional would force the State's representative, a Dallas Assistant District Attorney, into an inextricable corner since a) his own office lobbied the Texas Legislature to enact art. 35.261 in its current form, and b) the Texas legislature enacted that statute in the wake of this Court's ruling in Batson--and Batson itself cannot be unconstitutional! The Texas legislature's goal in so doing was to ensure compliance with, and conformity to, this Court's sound interpretation of the U.S. Constitution in Batson, in a manner consistent with both the letter and spirit of that case. Unable--and unwilling--to challenge the validity of the statute and the

Texas court's ruling, the State has resorted to makeweight arguments that utterly lack merit on their own (see, infra) and, in any event, do not belong in this Court.

ADDITIONAL CONSTITUTIONAL PROVISIONS

TEX. CONST. art. 1, § 3 states in relevant part:

> Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. art. 1, § 3a states in relevant part:

> Sec. 3a. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

It should be noted that Texas has a free and independent State Constitution and it has been interpreted independently of the U.S. Constitution. See, Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991).

STATEMENT OF THE CASE

On the first day of Respondent Hill's aggravated robbery trial, the trial court granted Hill's Motion in Limine No. 1, which is attached as an appendix, and instructed the State not to strike anyone on the basis of race. Significantly, this was prior to voir dire examination of the jury panel. The State has reproduced the "35.261/ Batson" hearing at pp. 49-51 of its Appendix to it's Petition for Writ of Certiorari. However, the State did not reproduce any of the questioning of prospective Juror Lastun by either the State's representative at trial or by defense counsel. By this omission, the State would seek to have this Court operate in a vacuum, leaving it up to the Court's imagination to speculate

as to what Juror Lastun might have said. Respondent has reproduced the entire questioning of the stricken venireman in his Appendix.

The State would have this Court believe that no defense was offered by Respondent at trial and that the jury was able to convict Respondent with little, or no, need for deliberation. Nothing could be further from the truth. The entire second volume of the trial record is devoted to Respondent's motion to suppress the identification of the Respondent in a photo lineup procedure. The officer who conducted the lineup, as well as all three witnesses, testified.

Complaining witness, Billie Dickey, established that the photo lineup, out of which she picked Respondent's picture, was suggestive in that only Respondent's photo was taken with the jail's height markers in the background, indicating that only Respondent's photograph was a "mug shot".

Witness, Violet Bell, had been unable to pick out any picture from the police-conducted photo lineup. At the pretrial hearing, however, Witness Bell picked out photograph "No. 6", a completely different person from Michael Hill. The trial court made a specific finding that witness Bell had failed to identify Hill. This is hardly the "corroboration" the State would urge this Court to have occurred.

Witness, Sharon Thompson, admitted in the pretrial hearing that Hill's photograph was distinctive, in that it contained "lines and numbers" whereas the other photographs contained no such markings.

The trial court ruled that the photo lineup was inadmissible. Defense counsel stated his intention of offer the lineup against

witness Bell and the State offered no objection.

The trial before the jury commenced on the morning of October 5, 1988. Witness, Billie Dickey, admitted that she had been totally unfamiliar with guns prior to the alleged robbery but had been able to describe the gun with sufficient particularity to the police on the date of the offense to enable them to determine the type of weapon it was - an automatic. However, after having Respondent approach the witness stand, witness Dickey admitted that she had not noticed the vivid tattoo on Respondent's right forearm, on the hand of the person who robbed her, although this was admittedly the same hand that held the gun.

In the presence of the jury, Witness Violet Bell admitted that she had picked out a different person from Respondent in the photo lineup.

Witness, Sharon Thompson, admitted that much of her attention had been focused on hiding her own jewelry during the course of the robbery. This witness also failed to see the tattoo that was on Respondent's hand on the hand of the robber. It was stipulated by the parties that Respondent had the tattoo on his arm prior to the date of the robbery.

The case was argued to the jury at 1:38 p.m. on October 5, 1988. Defense counsel argued that the obvious shock on the faces of the witnesses upon being confronted with the tattoo, that they had never seen before, spoke more clearly than words. Counsel argued that the true robber was the person selected out of the photo lineup by Violet Bell.

The jury was retired to deliberate on guilt or innocence at 2:08 p.m. on October 5, 1988. At 5:48 p.m., the jury foreman came

out and announced that the jury was deadlocked. The trial court allowed the jury to separate and ordered them to return at 8:30 a.m. on October 6, 1988 to continue deliberations.

The jury continued deliberations at 9:00 a.m. on October 6, 1988. At 10:38 a.m., the foreman announced that they were "hopelessly deadlocked". Deliberations had now gone on almost twice as long as the presentation of evidence before the jury. The trial court submitted an Allen-type charge. The jury returned to the jury room at 10:40 a.m. on October 6, 1988. They were excused from the jury room for luncheon recess at 12:00 noon, returned to continue deliberations at 1:00 p.m. and reached a verdict of guilty at 1:34 p.m. This was hardly the quick, easy jury verdict portrayed by the State. If this Court were to accept the State's version of the trial, it would doubtlessly conclude that the jury reached a "3-minute guilty" verdict. The State's statements to this Court pertaining both to this Court's "Jurisdiction" and to the synopsis of the trial have been far less than accurate. The State's legal analysis is even more troublesome.

This is not a close case. This is a case in which the prosecutor's momentary lapse of reasoning caused him to admit that he struck a juror explicitly because the juror was black and because of his assumption that the shared race of the juror and the defendant would cause the juror to favor the defendant over the State. A reason for a peremptory challenge cannot be racially-neutral when it is racially-specific, particularly where the hastily-contrived "add-on" reasons are clearly pretextual. When asked why he struck Lastun, the prosecutor said: "Your honor, I struck Mr. Lastun because I feel that he would identify with the

defendant. He's black, he's male, and I didn't like the way he responded to my questions." When pressed to identify the questions that he did not like the answers to, the prosecutor faltered and said: "I'll have to have them read back to me. I can't remember what they were [emph.] but I just didn't like the way he responded to my questions, his attitude, his demeanor."

Defense counsel pressed on, knowing full well that the prosecutor had only asked Juror Lastun about his occupation and whether he felt that he could think of any reason why he could not be fair and impartial in this particular case. Lastun, of course, had been a data technician with AT&T for twenty years, demonstrating his stability and ties to the community. But significantly, when cross-examined about Juror Lastun's one case-specific answer to the prosecutor's question about impartiality, the prosecutor admitted that Lastun answered the question, "as did everybody that qualified on the jury". Prosecutor Pickett admitted to a race-specific reason for striking Lastun and could not remember anything that Lastun had said. "Attitude" and "demeanor" are merely words that a prosecutor can be trained to regurgitate without much thought in a vain attempt to escape the consequences of prejudice, if the appellate courts will only allow them to do so. If this Court grants certiorari in this case and allows two such throw-away words as "attitude" and "demeanor" to extricate this prosecutor from his obvious faux pas, then the court might as well overrule Batson and abandon its noble efforts to enforce the equal protection clause in jury selection.

Quite simply, no case could provide a worse factual scenario for this Court on which to grant the writ of certiorari. All of

the main issues in this case have already been disposed of, as Respondent shall elaborate further, infra. See, e.g., Hernandez v. New York, 500 U.S. ____ , 111 S.Ct. 1364, 114 L.Ed.2d 411 (1991). The vigilance of the Texas appellate courts in their enforcement of Batson and art. 35.261 is to be applauded, not criticized, particularly when the Dallas District Attorney's office is concerned. It is common knowledge throughout Texas that this office within recent memory maintained a written policy directing its trial deputies to strike blacks and other minorities from juries. Ingrained habits die hard, a fact that is painfully obvious in this case. Nowhere is the Dallas office's mala fides more in evidence than in its repeated attempts to cloud the issues in this case by insisting below that Juror Lastun and Respondent were both young and black. The State has consistently distorted the facts of this case to attempt to render them analogous to the facts of a different case. Lee v. State, 747 S.W.2d 57, 59 (Tex. App. -- Houston [1st Dist.] 1988, pet ref'd.). The State's attempt to distort the facts of this case continued through oral argument to the Court of Criminal Appeals, to no avail.

This case concerns a "facially-discriminatory strike". In Batson, this Court specifically held that, as a matter of law, a "neutral" explanation cannot be that the shared race of the defendant and the veniremen would result in partiality to the defendant. Batson v. Kentucky, 476 U.S. 79, 97 (1986). Other facially invalid explanations are variations on this theme. Commentators have criticized the Batson opinion for side-stepping the issue of the extent to which race may be a factor in the decision to strike a juror, in that Batson defined the prohibited

act as striking veniremen "on account of their race". This Court then "clarified" the issue by requiring the strike to be "solely" by reason of the juror's race. Powers v. Ohio, 500 U.S. ____ , 11 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Texas courts have been very aggressive in attempting to define what would constitute a "facially-invalid" strike. A strike based on membership in a minority club was held to be facially-invalid. Moore v. State, 811 S.W.2d 197, 200 (Tex. App. -- Houston [1st Dist.] 1991, no pet.). Similarly, a peremptory challenge based upon NAACP membership was held to be facially discriminatory. Somerville v. State, 792 S.W.2d 265, 267-68 (Tex. App. -- Dallas 1990, pet. ref'd.). Texas has consistently rejected "sight strikes", i.e., strikes based only upon disliking the "looks" of a prospective minority juror. Davis v. State, 796 S.W.2d 813, 819 (Tex. App. -- Dallas 1990, pet ref'd.). Indeed, in the Court of Criminal Appeals opinion in this case, a four-man concurring minority argued for the creation of a "bright-line" rule: that equal protection is denied whenever race is a factor in the exercise of a peremptory challenge. Hill v. State, 827 S.W.2d 860, 875 (Tex. Crim. App. 1992) (concurring opinion). Judge Baird wrote, convincingly, that "one simply cannot articulate a `race neutral' explanation for exercising a peremptory strike when race is a part of that explanation." Id. The prosecutor's explanation in this case has received universal condemnation at seminars and in law review articles, see infra, because of its facial invalidity and further because the prosecutor could not remember anything specific that occurred during voir dire that would justify the race-specific strike. Pickett could not articulate any responses

where, during voir dire, the venireman indicated in some demonstrable manner that he really might have a racially-motivated or related reason to favor the Respondent.

One commentator, who happens to be a member of the Dallas County District Attorney's Office, contrasted "unacceptable Batson explanations" with "questionable Batson explanations", and found his colleague Pickett's explanation in this case to fall into the "unacceptable" column. G. West, Batson v. Kentucky and Article 35.261 - Part 3, 20 Voice for the Defense 21, No.2 (March 1991). The Dallas District Attorney's Office is truly divided against itself as to the validity of this explanation. As Respondent will later point out, the schizophrenia of this office is nowhere more evident than in its legislative posture with regard to Art. 35.261. TEX. CODE CRIM. PROC. art. 35.261 (Vernon 1989). It is chiefly due to the efforts of a member of this same Dallas office that the "replacement" remedy and the "before discharge" temporal requirement were not included in the statute. Did the Dallas D.A.'s trial section deliberately sabotage 35.261 in order to have defendants follow it, so that the appellate section could then argue that 35.261 was unconstitutional? Such Byzantine motivations surely escaped them. In reality, the reputation of this office for always seeking to win at any cost, regardless of the consequences to intellectual honesty, legal ethics, and its own credibility, is legion. Fricker, Win at Any Cost? Dallas DA Under Siege, 75 A.B.A.J. 52 (July, 1989).

The State devotes a great deal of verbiage to the prima facie case issue. As Respondent will develop further, this Court has thoroughly dealt with this issue in a recent opinion. Hernandez v.

New York, supra. No further elucidation of this issue by this Court would seem necessary at this time. The trial court obviously presupposed the existence of a prima facie case, possibly due to the common knowledge that racial discrimination in jury selection historically has always been at least an unofficial policy of the Dallas D.A.'s office, or else he would not have directed the prosecutor to offer a race-neutral explanation for his challenge.

In a recent case, this Court seemed to go to considerable lengths to avoid saying that "shared race" and "shared language" would constitute a "race-neutral" explanation. In the context of that trial, this Court held that "the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges." Hernandez v. New York, 500 U.S. ____, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395 (1991).

In this case, prosecutor Pickett's explanation, which was admittedly based on race, raised an inference [emph.] that the other factors were a pretext. Since he could not remember his questions or Lastun's answers, it was obvious that the "attitude" and "demeanor" reasons were entirely pretextual.

Unlike this case, the prosecutor in Hernandez avoided the inference by showing that "specific [emph.] responses and the demeanor of the two individuals during voir dire [emph.] caused him to doubt their ability to defer to the official translation of Spanish-language testimony." Id, 111 S.Ct. at 1867. The New York prosecutor pointed to specific, case-related, voir dire-illuminated conduct--statements and actions on the part of the stricken jurors-

-that left no doubt in the mind of this Court that the New York prosecutor had based his challenges on conduct of those jurors that actually occurred during voir dire. The conduct of the jurors had legitimately persuaded him that they might have difficulty in accepting the translator's rendition of Spanish-language testimony. This Court took great pains to distinguish between arguably race-based reasons, which are clearly based on conduct that definitely occurred during voir dire, and arguably race-based reasons, which could not possibly be based on anything that occurred during voir dire, as here.

Compared with Hernandez, the contrast between the New York prosecutor's explanation, which did not give rise to the inference, and Pickett's explanation, which clearly did give rise to the inference, could not be more obvious. Hernandez should be dispositive in this case because it illustrates that a prosecutor's race-specific explanation may yet pass muster in an appropriate case in which voir dire has revealed that the potential juror may have a problem sitting on a particular jury because of factors that are, arguably, connected with that juror's shared racial characteristics with one of the parties. Pickett's race-specific explanation combined with his obviously - pretextual "add-on" reasons are simply too incredible to be accepted by this Court. It wasn't even close, as in Hernandez.

The prosecutor must articulate a "clear and reasonably specific explanation" related to the particular case to be tried. Batson v. Kentucky, 476 U.S. at 98. If Pickett had conducted a voir dire of Lastun that had revealed some support for his, Pickett's, conclusion that Lastun would identify with Appellant,

then we might have a different case, but Pickett's voir dire was perfunctory in that in no way did it seek to explore Lastun's racial attitudes. Thus, Pickett's explanation was not based on anything that he had learned during voir dire but on mere assumptions, which Batson prohibits. Art. 35.261 requires a defendant to show only that "the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the State were made for reasons based on race." [emph.]. Here, the combination of a facially race-based [emph.] reason and the pretextual nature of the other factors cited by the prosecutor, as revealed by cross-examination, truly revealed that race was the sole reason for the strike in this case.

Since the State has never even attempted to show that Pickett struck all, or mostly all, the males from the jury, then "black and male" really serves as a pretext for striking only "black males". Pickett's assumption that Lastun would identify with Appellant only based on shared sex and shared race between Lastun and Appellant cannot escape the prohibition of art. 35.261 or Batson. Batson v. Kentucky, 476 U.S. at 97.

REASONS FOR DENYING REVIEW

I.

THE HOLDING OF THE COURT OF CRIMINAL APPEALS IN THIS CASE HAS MET WITH UNIVERSAL ACCEPTANCE AND, IF DISTURBED, WOULD SEND THE WRONG MESSAGE TO PROSECUTORS THAT THEY MAY ADMIT TO STRIKING JURORS ON THE BASIS OF RACE BUT THEN ESCAPE THE CONSEQUENCES OF THEIR ADMITTED RACIAL ANIMUS BY MERELY UTTERING THE WORDS "ATTITUDE" AND "DEMEANOR".

If the Dallas District Attorney is concerned about the public's perceptions about this case, then he should absolutely

prohibit his other associates from lecturing at statewide seminars. One of his representatives has characterized prosecutor Pickett's explanation in this very case as an "unacceptable explanation". See, Address by George West, Chief Felony Prosecutor, Dallas County District Attorney's Office, Batson Issues, Prepared for Texas Criminal Defense Lawyers Association Advanced Criminal Law Short Course (June 11-13, 1992). The same office that stands before this Court lamenting the "severe undermining" that will supposedly befall the public's confidence in the criminal justice system is simultaneously sending an emissary out on the lecture circuit to decry this case as an example to other attorneys of what not to say when called for a racially-neutral explanation for a peremptory challenge. This representative, while claiming to stand for the entire Dallas D.A.'s office, is teaching lawyers throughout the State of Texas that his colleague's explanation was "unacceptable", rather than merely "questionable". Address by George West, supra, at pp. 18-22. The fact that this office presents one point of view to the bar and a diametrically opposite point of view to this Court has not been lost on Respondent. Thus, Respondent has included the cover sheet and the relevant pages of the article in his Appendix, since this significant article appears to represent the more intellectually honest position of the Dallas D.A.'s office. This Court should consider the deleterious effects on public confidence in the criminal justice system that it would inflict by granting certiorari to review an explanation that the Dallas D.A.'s office has publicly disavowed.

Even more troublesome in its potential adverse impact on "public confidence" would be the schizophrenic posture taken by

this same Dallas D.A.'s office in the Texas Legislature. It is well established in the voluminous briefs in the lower courts that on February 21, 1989, a bill that was drafted by Jeffrey Brian Keck - the State's representative - was introduced before the Texas Senate for the primary purpose of restoring into art. 35.261 the "reconstituted jury" remedy and the "before discharge" temporal requirement. Those procedures were eliminated partly due to the efforts of Kevin Chapman, another Dallas County Assistant D.A., who testified before the legislature that the "replacement" remedy was potentially problematic because the stricken venireman might feel alienated at having been removed and might possibly hold a grudge against the State. Would public confidence in the criminal justice system be enhanced if the public perceived that the Dallas D.A.'s office had helped to establish a "straw-man" statute, art. 35.261; encouraged defense attorneys to rely on it on the lecture circuit; then asked that it be declared unconstitutional for the sole purpose of penalizing a defendant who invoked it? The public perception of such a Machiavellian and Byzantine plot, whether true or untrue, concocted apparently to enable the D.A.'s office to continue its policy of racial discrimination, could only further alienate the minority population of Dallas. Since the public might then perceive this office as a "house divided against itself", this Court should refuse to grant the writ, thereby compelling this Dallas D.A.'s office to finally develop a consensus as to its posture concerning what certainly was a "facially-discriminatory/unacceptable" strike. Further, if the "replacement" remedy must forever remain inviolate because of the permissive footnote at the end of the Batson opinion, then the Dallas D.A.'s

office should not be allowed to lobby to exclude the remedy from the statute and then stymie its application for that very reason. Batson v. Kentucky, 476 U.S. at 99 fn. 24. This is the most universally ridiculed explanation ever offered by a prosecutor in a Batson hearing. The public has had no problem understanding that this case was reversed because of a noble purpose - to eliminate racial discrimination in jury selection.

II.

THIS COURT SHOULD DENY REVIEW BECAUSE THE TEXAS LEGISLATURE MERELY EXERCISED ITS CONSTITUTIONAL POWER TO REGULATE VOIR DIRE WHEN IT ENACTED TEX. CODE CRIM. PROC. ART. 35.261.

In Batson, the defense attorney moved to discharge the jury before it was sworn. Batson v. Kentucky, 476 U.S. at 83. It is unlikely that this Court would declare unconstitutional a statute that establishes a procedure which is exactly the same as the one that provided the basis for the Batson opinion. The possibility of an additional "replacement/ reconstituted jury" remedy was added, almost as an afterthought, by way of a footnote to the Batson opinion. Id, 476 U.S. at 99 fn. 24. The "before discharge" temporal requirement was derived from the "reconstituted jury" remedy. The Texas legislature adopted art. 35.261 to eliminate a perceived "hodgepodge of remedies" and confusion on the part of attorneys as to when to raise the objection. The legislative history was clear that the legislature wanted to end the problem of trial courts' failure to address Batson issues because a defense attorney failed to raise the objection prior to discharge. The Texas legislature approves of Batson. They correctly perceive it

as an opportunity to instill confidence in the criminal justice system by minorities who come into contact with that system. The appellate courts are eager to enforce Batson because of the perceived need to eradicate the stain of official policies of purposeful discrimination, particularly in Dallas, where the policy was in written form and also received widespread negative publicity. In the election that first seated the incumbent District Attorney, John Vance, it was revealed that his opponent John Sparling, had authored the Dallas office's now-infamous written policies compelling its assistants to discriminate against minority veniremen. Given that this revelation sounded the death-knell for Mr. Sparling's political aspirations, it would seem that Mr. Vance's office ought to assiduously avoid even the appearance of condoning a facially-discriminatory peremptory challenge.

The legislature removed the "replacement" remedy from consideration by trial courts, after much debate and soul-searching, chiefly due to the efforts of Dallas Assistant D.A. Kevin Chapman, who apparently convinced the legislature that the reinstated veniremen might somehow figure out what happened and hold a grudge against the State.

The State has argued that the "before discharge" temporal requirement could serve a further useful purpose in providing "further information" during the Batson hearing, but the State has ignored the fact that, in Texas, prosecutors and defense attorneys exercise their strikes without having the jurors in their presence to associate names and faces so they should not need them present to explain those same strikes. The "stricken juror showup procedure" contemplated by the State would be a bad public policy

because it would only tend to "red-flag" to that juror that his racial or other irrelevant characteristics had been made into an issue at the trial, the very evil sought to be eliminated by art. 35.261. Such an individualized "juror lineup" procedure, accompanied by questioning about the juror's racial background, could only lead to embarrassment for all concerned.

The State's argument that defense attorneys might now admit to being racists to endlessly prolong trials and that trial judges will resist finding prima facie cases in order to avoid the whole Batson problem in the first place presupposes that neither defense attorneys or trial judges will ever fulfill their ethical duty and that no potential sanction other than the "reconstituted jury" procedure will force either one to follow the dictates of Batson. This ignores the fact that the original Batson opinion was handed down to keep prosecutors [emph.] from wrongfully striking jurors, since it was the prosecutorial element of all the potential trial participants that originally seemed to this Court to be most suspect of having ill-will or an evil motive, rather than defense attorneys or judges.

The notion that art. 35.261 is somehow invalid seems particularly meritless since one could presume that the procedure "suggested" by this Court for implementation of its rule in Batson would be constitutionally permissible. The argument also appears to ignore the fact that, in Texas at least, it is the legislature - not the trial courts - that bears the constitutional obligation to establish procedures for voir dir. TEX. CONST. ART. 1, § 15. If the legislature moved to abolish peremptory challenges altogether, would the State argue that the "replacement" remedy remained due to

the purportedly immutable procedure contained in Batson's footnote 24? As Judge Clinton of the Texas Court of Criminal Appeals remarked at oral argument in this case, a footnote seems like a strange place for this Court to announce such an inflexible and immutable principle. It would also seem unlikely that art. 35.261 could be unconstitutional since it is virtually identical to the procedure set forth in the case cited at footnote 24 in Batson. Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985).

III.

THIS COURT HAS ALREADY ANSWERED ALL OF THE STATE'S QUESTIONS ABOUT WHETHER AN APPELLATE COURT SHOULD REVIEW THE EXISTENCE OF A PRIMA FACIE CASE.

The State has argued that the appellate courts should rule on the merits and absolve the State of racism in its peremptory challenges, regardless of the lack of a prima facie case, if the State's reasons are actually found by the appellate court to be racially-neutral or if the appellate court rules that the defendant has failed to carry his ultimate burden. As to the defense, on the other hand, the State has argued that a defendant should be cut off procedurally by the "prima facie case dodge" if the State has failed to articulate a racially neutral reason or if the defendant carries his ultimate burden. Thus, the State argues that the appellate court should always evade the issue of racial discrimination by using the "dodge" where the State would lose, but conversely, should always address the issue on the merits where the State would win. The State cannot have it both ways. A racist district attorney would certainly be willing to volunteer his "race-neutral" explanations at a very early stage if he knew that

he could discriminate, and get away with it, by resorting to such a subterfuge.

The case law underpinnings for this Court's "mootness" doctrine do not limit themselves solely to situations which work only to the State's advantage. The beginning of the "mootness" analysis is at United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403 (1983) [hereinafter "Aikens"]. Aikens was a civil rights case that has been repeatedly found to contain an appropriate analogy for Batson cases. This Court in Aikens noted that:

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in those terms, they have unnecessarily evaded the ultimate question of discrimination vel non.

Aikens, 103 S.Ct at 1481.

Where the government offers proof of the reasons for its challenge, the Batson presumption that peremptories allow a prosecutor to discriminate where he is of a mind to discriminate drops from the case. The factfinder must then determine whether the defendant carried his ultimate burden of proving that the prosecutor's peremptories were exercised for a racially discriminatory purpose. The prima facie case method was never intended to be rigid, mechanized or ritualistic. Aikens, supra, 103 S.Ct. at 1482. This Court did not rule that the plaintiff, Aikens, should lose for failure to make a prima facie case if the District Court found on remand that he had carried his burden, as the State would have this Court believe. This Court did not remand

the case to the District Court to find the prima facie issue to be "moot" only if the Postal Service would win on the merits, as the State would suggest. On the contrary, the Court remanded the case to the District Court to consider Aikens' case on the merits.

The Supreme Court in Aikens instructed the District Court to consider Aikens' claim on the merits without evading the issue on the "prima facie case dodge" and indeed pointed out that it would not be reversible error for the District Court to conclude that the Postal Service had discriminated against Aikens. Id, 103 S.Ct. at 1481 fn.2. Indeed, why would this Court take such pains to point out to the District Court that it would not be reversible error for the District Court to rule for Aikens if it was actually only directing the District Court to overrule his claim on the "prima facie case dodge"? This Court ordered the District Court to decide which party's explanation it believed on the merits because the District Court had before it all the evidence it needed to decide the ultimate fact question of discrimination. The State's attempt to turn the "prima facie case dodge" issue into a shield only where it would otherwise lose finds no support in Aikens, which is the genesis of this issue.

If the State has misconstrued Aikens, then it has totally missed the point of United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987). The holding of that case is quite clear. When the prosecutor's explanation is of record, the reviewing court will review only the trial court's finding of discrimination vel non without becoming bogged down on the question of whether the defendant had made a prima facie case. By the time a fully-tried case reaches the reviewing court on appeal, the parties' showing at

the preliminary levels of the trial is irrelevant. Id, 816 F.2d at 1010.

The Fifth Circuit went on to give a complete analysis of when the establishment of a prima facie case will be the proper subject of the appellate court's review: when the prosecutor fails to give any explanation at all. Id, 816 F.2d at p. 1011. If the trial court fails to find that a prima facie case has been made and therefore does not require the prosecutor to respond, the appellate court will focus on the existence or non-existence of a prima facie case. In Forbes, the Assistant U.S. Attorney incorrectly believed that he only had to explain the majority of his challenges but the defense attorney waived an explanation for the third challenged black venireperson. The 5th Circuit Court pointed out that, "if defendants had raised below any question respecting this particular strike, or the prosecutor's continued silence, we would have to decide whether defendants had established a prima facie case." Id. It is difficult to understand how the State failed to grasp the significance of this language.

The State has argued that in the future its representatives will be reluctant to "volunteer" reasons for their strikes where the court has not specifically (correctly, in their sole estimation?) ruled that a defendant has properly made out a prima facie case. The State's attorney has once again ignored or missed the language of an opinion cited in its Petition for Writ of Certiorari that would actually work to the State's benefit in future cases. Hernandez v. New York, 500 U.S _____, 111 S.Ct. 1859, 1872, 114 L.Ed.2d 395 (1991). In that opinion, Justice Kennedy gave the prosecutor credit for volunteering his defense of his

peremptory challenges "without being asked to do so by the judge." Id, 111 S.Ct. at p. 1872.

Although the Supreme Court was willing to give the state in Hernandez some "credit" for its initiative, it was not willing to rule for the State on the "prima facie case dodge" urged by the New York prosecutor, as it is urged by the Dallas D.A.'s office in this case. Citing Aikens, supra, the Supreme Court noted that the prosecutor had defended his peremptories without any prompting or inquiry from the trial court. Thus, the trial court in Hernandez had no occasion to rule that the defendant had or had not made a prima facie showing of intentional discrimination. Id, 111 S.Ct. at p. 1866. It is true that Justice Kennedy went on to cite the language from Aikens about the defendant [emph.] "having done everything required of him," but the Aikens rule of "mootness" was not enunciated only for the benefit of the Postal Service, as the State would have this Court believe, and the Hernandez "mootness" rule should not be read in such a lopsided manner either. Aikens, supra, 103 S.Ct. at p. 1481 fn.2. The existence or non-existence of a prima facie case would not have prevented plaintiff Aikens from winning his case; likewise, nor would it prevent defendant Hernandez (or Michael Lee Hill), from arguing successfully that he carried his ultimate burden of showing intentional discrimination. As the Supreme Court stated without limitation:

> Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether defendant had made a prima facie showing becomes moot.

Hernandez v. New York, 111 S.Ct. at p. 1866.

"Mootness" does not apply only when the State should win on the merits. That argument is utterly without merit. "Mootness" applies where the State has advanced its "race-neutral" reasons for its challenge. At this point, the reviewing Court has everything it needs to make a ruling on the merits. Art. 35.261 was drafted for the purpose of eliminating such procedural dodges.

IV.

SINCE THE BATSON HEARING WAS HELD ON THE MERITS, THE EXISTENCE OF A PRIMA FACIE CASE IS NO LONGER RELEVANT BUT BATSON CLEARLY PROHIBITS EVEN ONE SINGLE CLEARLY RACIALLY-MOTIVATED STRIKE.

As Respondent has fully explained, the existence of a prima facie case is no longer reviewable. However, it seems elementary that a case could arise where it would become perfectly obvious that a prosecutor had intentionally discriminated against one, but not all, minority jurors, which is exactly what happened here. For instance, the obvious example would be where a prosecutor actually admits that he struck a particular juror solely on account of his race, as in this case. It will probably be such a rare occurrence that this Court need not worry that it is opening "Pandora's Box", as the State would suggest, because such an admission could only be the result of a momentary lapse of reasoning by a prosecutor.

It is quite obvious that Batson explicitly applies to the racially-motivated peremptory challenge of a single black juror. Batson v. Kentucky, 476 U.S. 99, fn.22. It has been recognized that it would certainly be easier to find the presence of a prima facie case where all blacks are excluded; however, it cannot be said that the inclusion of blacks on a jury bars a prima facie

case, "especially where other facts and circumstances may constitute an inference of prosecutorial discrimination in the selection process." United States v. Clemons, 843 F.2d 741, 747 (3rd Cir. 1988).

The State's erroneous citation of Unites States v. Clemons is another example of the total lack of credibility to which this State's effort is entitled. In its Petition, the State cites Clemons for the proposition that "every federal court...has held that the strike of a single black venireman cannot standing alone constitute a prima facie case." (State's Pet. p. 23). Of course, if one overemphasizes the phrase "standing alone", this statement may be literally true but totally beside the point. No one would argue that any one factor, other than an outright admission of a racial animus, such as in this case, would ordinarily constitute a prima facie case. However, the State's point is at the least highly misleading in that the principle enunciated by the State seems to be completely at odds with the opinion from which the State claims to draw its authority. In United States v. Clemons, the court held:

> Striking a single black juror could [emph.] constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks.

United States v. Clemons, 843 F.2d at 747. This is precisely the opposite proposition for which the State attempts to cite this case. Careful consideration should be given to granting review based on such suspect scholarship.

This Court has properly avoided, and should continue to avoid, creating any per se rule governing how many blacks or other

minorities must be struck to constitute a prima facie case under Batson. Batson requires trial courts to "consider all relevant circumstances", including, but not limited to, a consistent pattern of strikes against black jurors or "a prosecutor's statements during the voir dire process". Batson v. Kentucky, 476 U.S. at 96-97. Thus, Batson would seem to require that the trial court consider "disparate" or "perfunctory" questioning without any need for prompting by defense attorneys or use of "buzz words". The trial judge obviously considered the lack of any meaningful questioning directed to Juror Lastun, as well as his perfectly normal response, which was in no way dissimilar to the responses of the white male jurors who qualified on the jury.

Furthermore, the State's reliance on United States v. Chalan appears to be misplaced. In that case, three out of four Indian jurors were removable for cause and the government used a peremptory challenge to strike "the last remaining juror of defendant's race". This was held to be a prima facie case, even though the government used a peremptory only on one minority juror. It is difficult to discern any major distinction between a situation in which some minorities make it on the jury and a situation in which all but one admit to a bias and have to be stricken for cause. That court said only that the striking of a single juror may not always be sufficient to establish a prima facie case; it did not suggest that striking a single venireman would never be sufficient. This Court should refuse to adopt such a bright-line rule. United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987). This might appear to grant the State license to strike minorities from juries by resorting to the subterfuge of

leaving a single token on the jury.

V.

AN APPELLATE COURT, WHEN REVIEWING A FACIALLY-DISCRIMINATORY REASON FOR A PEREMPTORY CHALLENGE, SHOULD PROPERLY GIVE NO CONSIDERATION TO THE IRRELEVANT FACT THAT OTHER MINORITY JURORS MAY HAVE ACTUALLY SERVED ON THE JURY.

Pickett struck Lastun admittedly because Lastun was black and because he did not like Lastun's answers to his questions. When pressed, Pickett could not remember the questions or the answers, establishing an obvious pretext. The words "attitude" and "demeanor" are too non-specific to amount to anything but a plain pretext. The "perfunctory" nature of Pickett's questioning of Lastun was established during defense counsel's cross-examination of Pickett. Keeton v. State, 749 S.W.2d 861, 868 (Tex. Crim. App. 1988); Tompkins v. State, 774 S.W.2d 195, 202 fn. 6A (Tex. Crim. App. 1987), affd. 109 S.Ct. 2180 (1989). The "disparate impact" of Pickett's strike was pointed out during cross-examination by Pickett's assertion that Lastun had answered his questions exactly as did everyone who qualified on the jury. Under the circumstances, the Texas Court of Criminal Appeals was left with a definite and firm conviction that the trial court had made a mistake. The original Batson opinion recognized that a single discriminatory strike is not immunized by the absence of a discriminatory animus toward other jurors. Batson v. Kentucky, 476 U.S. at 95. Thus, the presence of the two black jurors was entitled to no consideration under the circumstances.

VI.

THERE ARE NO CIRCUMSTANCES UNDER WHICH A HARMLESS ERROR ANALYSIS MAY BE PROPERLY APPLIED TO BATSON ERROR.

The State's arguments on "harmless error" show a fundamental misunderstanding of the reasons underlying Batson. As noted in Batson:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. [citations omitted] Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others...[citations omitted].

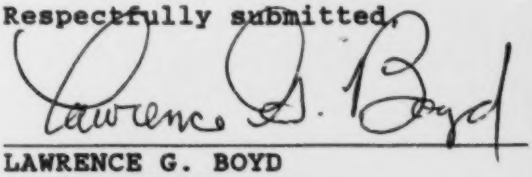
Batson v. Kentucky, 476 U.S. at 87-88. Batson is not really concerned solely with the protection of criminal defendants' rights. Considering the recent extension of Batson to prohibit racially-motivated strikes by all criminal defendants, this should be abundantly clear. Georgia v. McCollum, ____ U.S.____, 60 L.W. 4574 (1992). In all likelihood, under certain circumstances, a criminal defendant might well obtain a "fairer" trial (at least from his perspective) if he were free to discriminate at will. The criminal defendant, Respondent herein, in a sense, also stands in the shoes of the improperly-stricken Juror Lastun, who had a right cognizable under the U.S. and Texas Constitutions, as well as art. 35.261 to serve on this jury, duly hear the evidence and find Respondent either guilty or not guilty. Accordingly, whether or not a different outcome might have accrued is never the point in a case where a peremptory challenge is used to strike a venireman on

the basis of race.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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No. 0347-90

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

AUSTIN, TEXAS

MICHAEL LEE HILL,
APPELLANT

VS.

STATE OF TEXAS,
APPELLEE

STATE'S MOTION TO RECALL MANDATE AND TO STAY REISSUANCE OF MANDATE FOR NINETY DAYS

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW the State of Texas, by and through her Criminal District Attorney and files this motion to withdraw the mandate of this Court in the instant case, and pursuant to T.R.A.P., Rule 232, to order that the re-issuance of the mandate in this cause be stayed for 90 days so that the State may timely file a petition for a writ of certiorari in the instant case. In support of this motion the State would show the Court the following:

I.

A. Proceedings in the Court of Appeals

The instant conviction was ordered reversed by the Court of Appeals in an opinion issued July 31, 1989. (Cause No. 05-88-01234-CR; in the trial court, the 283rd Judicial District Court of Dallas County Texas, Cause No. F88-72876). The basis for the order of reversal was that the trial court had erred in denying the Appellant's motion for dismissal of the jury panel based on the Appellant's federal constitutional equal protection rights as enunciated in Batson v. Kentucky, 476 U.S. 79 (1986).

The State's motion for rehearing of August 15, 1989 was overruled by the Court of Appeals on January 18, 1990, although a new opinion was issued by the Court of Appeals at that time. This second opinion also reversed the conviction, again on Batson grounds. See opinion at 787 S.W.2d 74,77-79.

Thereafter, the State filed a second motion for rehearing in the Court of Appeals pursuant to T.R.A.P., Rule 100(d)(West 1989). This motion was overruled on February 21, 1990.

B. Proceedings in the Court of Criminal Appeals

1. petition for discretionary review

The State's timely filed petition for discretionary review was filed on March 23, 1990. This petition was granted by this Court and the case was submitted on oral arguments on January 31, 1991.

This Court then affirmed the holding of the Court of Appeals, although on slightly different reasoning, in an opinion issued January 8, 1992.

2. State's motion for rehearing

The State's first motion for rehearing was filed January 29, 1992, following a grant of an extension to file the same. The State's first motion for rehearing was overruled on April 15, 1992.

3. State's second motion for rehearing and issuance of mandate

The State's second motion for rehearing[1] was mailed on April 28, 1992. The clerk of this Court (or his deputy) has orally advised the undersigned that the second motion for rehearing was not received by the clerk of this Court until May 4, 1992.

In the meantime, on May 1, 1992 this court had issued its mandate (May 1 being 15 days after the denial of the State's first motion for rehearing).

Accordingly when the State's second motion for rehearing arrived at the Court, the mandate had already issued. Upon receipt of the second motion for rehearing, this motion was ordered dismissed, since the mandate had already been issued.

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[1] This motion urged the court to reconsider its previous rulings in light of the Court's recent opinion in Linscomb v. State, ____ S.W.2d ____, No. 203-91.

II.

Reasons supporting withdrawal of mandate

On May 7, 1992, the undersigned's office received the postal card (copy attached) advising the undersigned that the State's second motion for rehearing had been dismissed.

Due to the fact that the undersigned saw only a photocopy of this card, and due to the fact that the message was obscured by virtue of the fact that it had been typed on over the return address and the postmark, the undersigned believed that this card was only notice that the State's second motion for rehearing had been received by the Court, rather than acted upon. (It must be pointed out that the word "dismissed" is at least legible, even if none of the other information is clearly printed).

However, by May 26, 1992, the undersigned had become concerned that the Court had still not acted on the State's second motion for rehearing[2] and called the clerk's office. At this time the undersigned learned that the State's second motion for rehearing had been dismissed on May 4 and that the mandate had previously issued on May 1, 1992.

In the interim the undersigned had sought and obtained permission from the Attorney General of the State of Texas to file a petition for certiorari on behalf of the State of Texas in the Supreme Court of the United States. (Obtaining such permission is a rather

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[2] Although the undersigned had filed the second motion for rehearing in good faith and not to simply delay the ultimate ruling on the case, given the fact that all nine judges of this Court had voted against the State and the State's first motion for rehearing had been refused within three weeks, the undersigned believed that the second motion for rehearing would probably not result in a reversal of this court's position, despite the merits of the motion.

laborious task which the undersigned, as well as the Assistant Attorney General's involved, would not like to repeat in order to get these issues before the Supreme Court). Permission to file certiorari was received on May 4, 1992.

T.R.A.P., Rule 232, provides that the court may issue a stay of mandate to allow for a timely filing of petition for a writ of certiorari to the U.S. Supreme Court. The State is asking for a 90 day stay (as of May 1, 1992). to accommodate the 90 day time limit for such petitions now allowed by Rule 20.1 of the Supreme Court rules for petitions for writ of certiorari.

The undersigned believes that the instant case presents at least two issues that have not been, but ought to be decided by the U.S. Supreme Court. While these issues will be present in other cases, the undersigned believes that they will not be presented soon in any other case where the facts render the legal issues involved so remarkably clear and free of any troubling questions about the prosecutor's intent.

PRAYER

WHEREFORE PREMISES CONSIDERED the State respectfully prays that

1. This Court order its mandate in the instant case recalled and that the Clerk of the Court of Appeals of the Fifth District of Texas be advised of this decision.

2. That the issuance (or re-issuance) of the mandate be stayed for 90 days, (from May 1, 1992) that is until July 31, 1992 to allow the State to file a petition for a writ of certiorari in the Supreme Court of the United States.

Respectfully submitted,

JOHN VANCE
CRIMINAL DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

By: _____

JEFFREY B. KECK
ASSISTANT DISTRICT ATTORNEY
STATE BAR NO. 11144500
FRANK CROWLEY COURTS BLDG.
133 N. INDUSTRIAL BLVD., LB-19
DALLAS, TEXAS 75207-4399
(214) 653-3628

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been served on Larry Boyd, Attorney for Appellant, 5630 Yale Boulevard, Dallas, Texas, 75206, by depositing same in the United States Mail, Postage Prepaid, on this the 27th day of May, 1992.

_____
JEFFREY B. KECK

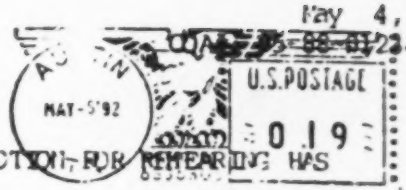
JBK/sn

APPENDIX A

Notice of dismissal of
State's Second Motion for Rehearing

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE

May 4, 1992
88-01224-CR



Lee

S SECOND MOTION FOR REHEARING HAS

Tho. ... Law., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: JOHN C VANCE
DISTRICT ATTORNEY
133 ... INDUSTRIAL BLVD LB-19
DALLAS TX 75207

05-07-92

BEST AVAILABLE COPY

NO. F-88-85869
F-88-72875
F-88-72876

STATE OF TEXAS	§	IN THE CRIMINAL
V.	§	283RD DISTRICT COURT
MICHAEL LEE HILL	§	DALLAS COUNTY, TEXAS

MOTION IN LIMINE NUMBER ONE

COMES NOW the Defendant, MICHAEL LEE HILL, prior to voir dire of the jury panel, who requests the Court to instruct the prosecution not to use racial discrimination in its exercise of peremptory challenges in jury selection. Batson v. Kentucky, ____ U.S. _____, 106 S.Ct. 1712 (1986). Tex. Code Crim. Proc. Ann. Art. 35.261.

WHEREFORE, premises considered, defendant prays the Court grant this motion and instruct the prosecution not to use racial discrimination in its exercise of peremptory challenges.

Respectfully submitted,

Lawrence G. Boyd

Lawrence G. Boyd
TBC #02775200
4627 N. Central Expressway
Dallas, Texas 75205-4094
(214) 528-2400

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion has been hand-delivered to the District Attorney's office this 14th day of Sept., 1988.

L. G. Boyd

Lawrence G. Boyd

BEST AVA

ORDER

On the _____ day of _____, 19___, came to be heard Defendant's Motion in Limine Number One and it appears that it should be granted.

The prosecution is ordered not to use racial discrimination in its exercise of peremptory challenges.

SIGNED this _____ day of _____, 19___.

_____
JUDGE PRESIDING

AILABLE COPY

October 1, 1986 - 1:10 p.m.

P R O C E E D I N G S

(Following proceedings had prior to voir dire examination of any jury panel.)

THE COURT: Is there anything that you can't agree on, first of all? These motions usually have about thirty paragraphs in them.

MR. BOYD: Which case are we going on today?

THE COURT: I'm looking at 72876.

You've got a ~~Batson~~ motion. I'll instruct the State not to strike anybody on the basis of race. I think that's what the motion is all about.

I see a motion to suppress in there. Are we going to have a hearing on that?

MR. BOYD: I think we better. I'm still trying to figure out how the State -- Did you have any physical evidence recovered from the truck that you intend to --

MR. PICKETT: In this case?

MR. BOYD: Uh-huh. I think you do.

MR. PICKETT: Just a credit card.

MR. BOYD: Okay. They have a credit card that they intend to offer that was seized as a result of that third case,

BEST AVAILABLE COPY

The following are all of the questions and answers for the State to Juror Lastun (R.- Vol. I, p. 23-24):

MR. PICKETT: Is that Lastun? Is that right, sir?

PROSPECTIVE JUROR: Uh-huh.

MR. PICKETT: What do you do for A T & T?

PROSPECTIVE JUROR: I'm a data tech--

MR. PICKETT: Pardon me?

PROSPECTIVE JUROR: A data technician.

MR. PICKETT: A data technician? How long -- I can barely read that. How long have you been with that company?

PROSPECTIVE JUROR: Twenty years.

MR. PICKETT: Can you think or any reason why you would not be fair and impartial in this particular case?

PROSPECTIVE JUROR: No.

MR. PICKETT: Okay.

For the purposes of including all comments by Juror Lastun, defense counsel asked the following question (R.-Vol. I, p. 52):

MR. BOYD: Mr. Lastun?

PROSPECTIVE JUROR: A friend of mine at work got robbed.

MR. BOYD: Okay. Did you discuss the facts of the case with him?

PROSPECTIVE JUROR: Well, yes, she told us what happened.

MR. BOYD: Okay. Do you feel that that would cause you any problem, like if you ever saw that friend again and you were -- had to defend yourself and say "Well, we acquitted someone who was accused of a crime like that"?

PROSPECTIVE JUROR: I don't think so.

Further, the following comments were made in response to questioning by defense counsel (R.- Vol. I, p. 59):

MR. BOYD: Ms. Ortosky, could you give the defendant the benefit of your individual judgment?

PROSPECTIVE JUROR: Yes.

MR. BOYD: Mr. Lastun, do you feel like you could?

PROSPECTIVE JUROR: Without a doubt.

BATSON ISSUES

Presented by

GEORGE E. WEST II

CHIEF FELONY PROSECUTOR
DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE
DALLAS, TEXAS

Prepared for

The TCDLA/HONORABLE M. P. "RUSTY" DUNCAN, III

ADVANCED CRIMINAL LAW SHORT COURSE

June 11-13, 1992

SAN ANTONIO, TEXAS

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BIOGRAPHICAL INFORMATION

EDUCATION

J.D. University of Texas
B.A. in Political Science with Distinction, Southern Methodist University
SMU Abroad: Paris, France, Joint Program

PROFESSIONAL ORGANIZATIONS

State Bar of Texas
Texas District and County Attorney's Association
National Bar Association (Former member)
J. L. Turner Legal Society (Former member)

LAW RELATED ACTIVITIES

Faculty Advisor, Criminal Trial Advocacy (CDLP), Sam Houston State University
Committee Member, Dallas Practical Skills Course, State Bar of Texas, Dallas, Texas
Chief Felony Prosecutor, Dallas County District Attorney's Office.
Advisor to the Governor on the Texas Punishment Standards Committee.
Member of the TDCAA Legislative Committee
Legislative Liaison for the Dallas County District Attorney's Office.
Former Chairperson of the Dallas Citizen/Police Review Board.

LAW RELATED LECTURES AND PUBLICATIONS

Speaker and Author, "Direct Examination," Prosecutor Trial Skills Course, TDCAA, Austin, Texas
Speaker and Author, "Voir Dire Problems," Prosecutor Trial Skills Course, TDCAA, Austin, Texas
Speaker and Author, "Grand Jury," Criminal Law Institute, South Texas College of Law
Author, "Effective Prosecution of Sex Offenses Against Children," Voice for Defense
Author, "Final Argument in Capital Murder Cases," TDCAA, Capital Murder Prosecution Course, Austin, Texas
Speaker, "Prosecuting Sex Offenses," Fort Worth Bar, Fort Worth, Texas

xi. Strike upheld based on juror's employment Rasco v. State, 739 S.W.2d 437 (Tex. App. — Houston [14th Dist.] 1987, pet. ref'd).

xii. Strike upheld on the basis that the juror looked too cool, seemed too arrogant, and appeared disinterested. Ybarro v. State, 775 S.W.2d 409 (Tex. App. — Waco 1989).

xiii. Marital status was one factor considered relevant and legitimate basis for a challenge. Crawford v. State, 770 S.W.2d 51 (Tex. App. — Texarkana 1989, no pet.).

xiv. Unemployment was held to be a legitimate reason for exercising a peremptory challenge. York v. State, 764 S.W.2d 328, 331 (Tex. App. — Houston [1st Dist.] 1988, pet. ref'd).

xv. Challenges for cause which should have been sustained by the trial court may be viewed as neutral explanations by the appellate court. (See Section VIII, p. 50 for the various challenges for cause.).

e. Unacceptable Explanations

i. "Black veniremen flocked together" is a patently racist explanation, according to the Dallas Court of Appeals. Hill v. State, 775 S.W.2d 754 (Tex. App. — Dallas 1989).

ii. "I struck [him] because I felt he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions." Hill v. State, 775 S.W.2d 754 (Tex. App. — Dallas 1989, pet. ref'd).

iii. Stereotypical statements such as "I don't like people with beards because they are lenient on crime" will be an unacceptable explanation if there is no showing that the reasons for the State's stereotypical basis applies to the venireman. Woods v. State, No. 05-88-0073 (Tex. App. -- Dallas, March 16, 1990) (unpublished); Miller-El v. State, 782 S.W.2d 892 (Tex. Crim. App. 1990).

iv. "No eye contact," by itself is too vague for the courts to accept. Daniels v. State, 768 S.W.2d 315 (Tex. App. -- Tyler 1988). But see Jones v. State, No. 05-88-0082 (Tex. App. -- Dallas 1990) (published). The prosecutor explained generally that if he was involved in voir dire and the person to whom he was talking made no eye contact, the impression he got was that they were not interested in what he was saying and would not give him the attention he was looking for at trial. Jones, Slip op. at 6.

v. Statement such as the venireperson showed more interest in the defense attorney is insufficient to satisfy the prosecutor's burden of offering plausible, racially neutral, trial related explanation for use of its peremptory challenges. Daniels, supra.

vi. Striking black venire persons because they were conservative while not striking similar white venirepersons will render such explanation unacceptable. Vann v. State, 788 S.W.2d 899 (Tex. App. -- Dallas 1990, pet. ref'd).

vii. Striking juror based upon low intelligence without addressing the juror with individual questions is improper. Chavers v. State, 796 S.W.2d 539 (Tex. App. -- Dallas 1990).

viii. Striking the venireperson because he was a member of an organization concerned with the advancement of black persons rights which had been involved in cases with the District Attorney's Office was not a race-neutral answer and therefore improper. Somerville v. State, 792 S.W.2d 265 (Tex. App. — Dallas 1990).

ix. Where a black venirewoman was struck from the jury for not having children and white venirewomen without children were not struck, then the strike was discriminatory. C.E.J. v. State, 788 S.W.2d 849 (Tex. App. — Dallas 1990).

x. A sight strike by the State or someone that the State felt would not fit with the category of jurors the State wanted would not be sufficient under Batson. Davis v. State, 796 S.W.2d 813 (Tex. App. — Dallas 1990).

f. Questionable Explanations

i. Because the juror appeared to have a dumbfounded or bewildered look on his face;

ii. Because he appeared unkept;

iii. Because he appeared gruff;

iv. Because he frowned at me and smiled at the defendant's attorney;

v. Because he appeared to pay more attention to the defendant's attorney than he did me;

vi. Because he was inattentive when I asked him questions, but when the defendant's attorney asked him questions he appeared to be attentive;

vii. Because he appeared to be in a bad mood;

viii. Because he did not appear to know what life is like or what life is all about;

ix. Because he may live in the same neighborhood where the defendant lives;

x. Because he was unemployed;

xi. Because he was overly employed;

xii. Because he was a scientist, school teacher, doctor, lawyer, judge or cook at the country club;

xiii. Because he appeared to be too smart;

xiv. Because he appeared to be too dumb;

xv. Because he was employed at X corporation and my past experience with employees of same have led me to conclude that persons employed by X corporation make terrible jurors for the State;

xvi. Because he was physically handicapped;

xvii. Because he appeared to be mentally disturbed;

xviii. Because he was too ugly;

xix. Because she was too pretty;

xx. Because he was the same age as the defendant;

xxi. Because he has a grandchild the same age as the defendant;

xxii. Because I thought the juror and the defendant were employed by the same company;

xxiii. Because he wore a gold earring in his ear.

See Keeton II, 749 S.W.2d at 877.

4. Remedy for Batson Violation

a. Under Batson:

If the prosecutor fails to rebut the prima facie case with regard to any or all of his peremptory challenges, then the trial court must act to remedy the situation. The Batson court specifically left open the question of whether this remedy is to "discharge the venire and select a new jury from a panel not previously associated with the case" or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. Batson v. Kentucky, 106 S.Ct. at 1724, n. 24, 90 L.Ed.2d at 90, n. 24.

b. Under Article 35.261:

Article 35.261 provides that "[i]f the court determines that the attorney representing the State challenged prospective jurors on the basis of race, the court shall call a new array in the case. Despite the statute's use of the work "shall," one appellate court has held that the trial court has discretion to